NO. 9220

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, acting for and in behalf of the Farm Credit Administration, *Appellant,*

vs.

J. A. BURLEIGH, *Appellee.*

Brief Answering Brief of Amici Curiae

Upon appeal from the District Court of the United States for the District of Oregon

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This brief, as would be expected from its distinguished ıthor, is an interesting document; however, it is replete ith statements of fact which are not parts of the record this case, which naturally, and to the extent they may material, places the defendant at a serious disadntage.

If the trial counsel had seen fit to introduce into the cord evidence of the facts contained in the earlier pages this brief, the defendant would thereby have been tenred an opportunity to meet the same by other comtent proof in case there was reason to dispute any of lese facts.

Failing to offer this opportunity to the defendant, we are under the necessity of confining our answer to the record as made, and as it now appears before this court.

In discussing this brief we are under the necessity of calling to the court's attention certain disparities between the statements in the brief, and the unquestioned evidence as it appears in the record, but before doing so we wish to cover all of these points in the one statement that we have no doubt of the good faith of the author of this brief, and feel that such errors as we shall call to the court's attention have occurred innocently in an endeavor to handle an unfamiliar subject of considerable proportions and many details; due to the complexities of the record, and large amount of details, it would be only natural to assume that the relationship of some parts of the testimony to other parts might be overlooked by an author who was not present at the trial, and who was attempting to co-relate all of these matters from the record.

On page 10, in an attempt to show that the company had the required unimpaired capital demanded by the statute for the volume of loans discounted with the bank, counsel says:

> "To it (the loan company) the Federal Intermediate Credit Bank of Spokane had extended credits by resdiscounts amounting to about $635,000. To maintain this credit it should have a capital of $63,50

not less liquid than livestock loans. *Some of its capital had become real estate mortgages or real estate owned."*

The minutes of the first meeting of the loan company isclose that the real estate mortgages which were under rious question originated at the very inception of this mpany; that a large part of the stock of the loan company was purchased and paid for by the sale and transfer various items of property, with practically no cash. he so-called Benton County farm, with its entailments losses throughout the years, originated in this company the stock subscription of W. H. Curtice Estate (R. 34-5-6). This estate purchased 507 shares of Class "A" referred stock, 23 shares of Class "B" Preferred stock, nd 2600 shares of common stock, and paid for it in part follows:

A $3000 note of Curtice Farms, Inc., secured by cattel mortgage on property in Benton County;

A $15,600 note of Curtice Farms, Inc., secured by a mortgage on real estate in Benton County;

A $7800 note of Curtice Farms, Inc., secured by a rtgage on real estate in Benton County;

A $6600 note of Curtice Farms, Inc., secured by a rtgage on real estate in Benton County;

The only other payment on this large stock purchase was by assignment of a note of Willis A. Tway for $20,000, secured by a mortgage on real estate in Benton County;

So, the statement in this brief that "some of its capital stock had become real estate mortgages, and real estate owned" might be misunderstood by the court, for from the very start of the corporation, at least $55,600 of the capital of this corporation was in the class of investments denounced by this brief as unacceptable as a basis for loans.

Another 20 shares of preferred stock was to be paid for in cash, except $598, which was to be paid for by the assignment of a certain contract for the sale of property (R. 387).

This brief appears to have been written upon the theory that although one officer, agent or department of the plaintiff might have notice or full knowledge of facts which would debar a private corporation or an individual of an otherwise good right of recovery, that as to the plaintiff the notice or knowledge must be brought home to the particular officer or agency involved in a particular transaction; in other words, counsel apparently feels that unless the Secretary of Agriculture knew of the decrepit financial condition of the loan company, and

he gross fraud that was being practiced upon the defend-
nt, that the plaintiff would not be bound by the know-
edge of all of the facts then possessed and during the
rogress of the sale of this stock which came to the know-
edge of plaintiff's agent—the bank.

Upon the authority of the citations in our original
rief we submit that when the United States of America
nters into commercial transactions, it does so on the same
rms and subject to the same limitations as are enjoyed
y, and enforced against private litigants.

Counsel comments on the fact that financial state-
ents were only introduced in evidence for the period
om March 31, 1931 to October 30, 1931.

These exhibits, which were introduced in evidence,
ere carbon copies, the originals of which were sent to the
nk regularly each month as official documents. These
atements were introduced while President Warren was
the stand (R. 286) and were identified and explained
Secretary-Treasurer Hindle, while on the stand (R.
0).

If the plaintiff had felt that the financial statements
this company, prior or subsequent to the ones which
re introduced, would be of any use in the determination
this case, then the plaintiff should have introduced the
me in evidence, or called upon the defendant to produce

any other similar documents under the control of its wit
nesses, the officers of the loan company.

We make the same observation with respect to coun
sel's criticism on page 20, and the alleged fact that th
entire examiner's report was not introduced in evidenc
The defendant introduced what was felt to be necessar
to get the facts clearly before the court, and the plain
tiff made no demand, request or suggestion that any
thing additional was desired or would be of any benef
to anyone, for which reason we respectfully suggest tha
it is now too late to undertake by argument, suggestio
and innuendo to undermine the logical effect of the doc
ments which were introduced.

It is intimated, perhaps stated, that the statement
the company's affairs as of March 31, 1931, includes
capital stock some stock covered by subscriptions f
stock which had been acquired as a result of the campaig
to sell Class "A" stock. Counsel refers (br. 28) to t
directors' meeting of January, 1932, but does not c
the court's attention to the minutes of the meeting he
April 13, 1931, when provision was made by the direct
for the very Class "A" stock which was actually sold
Burleigh and the other persons similarly situated.

It is true that the letter to Burleigh was writt
March 19, 1931, but Mr. Burleigh testified that he p

o attention to this letter. In this connection Mr. Burigh testified (R. 175):

> "Some time following the receipt of that letter, to which I did not reply, Mr. W. T. Wright came to Wallowa County."

Mr. Burleigh's note is dated April 15, 1931. The mintes of the meeting of April 13, 1931 (R. 389) refer irectly to the purpose of the corporation to take advanige of Public Resolution No. 666; that the officers of ie loan company had been in conference with the bank, ie representative of the Department of Agriculture, and ie Advisory Committee appointed for the State of Oreon, in connection with securing the benefit of the appropriation made under this resolution for the purpose of *creasing the capital of this corporation.* It is then cited:

> "He (the President) also stated that some of the owners of Class "A" Preferred Stock of this corporation had expressed their willingness to sell said stock to the corporation at Seventy-five ($75.00) Dollars a share, and use the proceeds to purchase Class "B" Preferred Stock at par."

uthority for this transaction was granted by a motion.

An additional 100 shares of Class "A" Preferred tock to sell to Burleigh and others were acquired from

Portland Livestock Company, Inc., under the followin proposition:

> "The President stated that the Portland Livestoc Company, Inc., had proposed to sell to this corpora tion one hundred (100) shares of Class "A" Pre ferred Stock at Seventy-five ($75.00) Dollars pe share, providing the corporation would credit the ol ligations it held against the Portland Livestock Com pany, Inc., Seventy-five Hundred ($7500.00) Dollar

This transaction was also authorized.

In view of the willingness of a distressed debtor sell its "A" stock at 75% of par, it would seem th counsel's comments on the desirability of exchanging "A stock for "B" stock is, to say the least, considerably besi the mark.

The real purpose of the entire transaction is obviou The loan company was under extreme pressure from t bank to cure its financial ailments. It wanted the ba for a bookkeeping entry to charge off some of its mo worthless credits, and when it had created this bookke ing entry by the 25% discount on stock from form r owners, and the Portland Livestock Company, Inc., t proceeded, at its meeting of June 22, 1931, to mark p the alleged profit made by this transaction in the sum f $10,950 as a credit (R. 394), and then charged agai t

and to the Surplus account $14,950, which the company as under the necessity of charging off.

That the Portland Livestock Company, Inc. was a ominal and complacent actor in this affair is evidenced y the following:

(a) Its paper was objected to for various reasons, ncluding the fact that it was owned by officers of the an company;

(b) The fact that its own account was charged to rofit and Loss to the extent of $3620.01 on January 15, 934 (R. 311), and that its only asset was some common ock of the loan company (R. 262-3).

That counsel is in error in his supposition that at least part of the "A" and "B" Preferred Stock, shown in the nancial statement of March 31, 1931 (R. 286-7-8) rep- sents subscriptions by Burleigh and others is clearly re- ted by the following from the record:

At the first meeting this corporation held October 5, 925, (R. 380-388) we learn that the stock of this cor- poration was paid for in the following amounts, as fol- lws:

100 shares Class "A" Preferred stock by Will T. Wright (R. 381),

25 shares Class "A" Preferred stock by E. M. Wright (R. 382),

155 shares Class "A" Preferred stock by Commer cial Investment Company, by Will T. Wright President (R. 382-3-4),

2600 shares common, 507 shares Class "A" Pre ferred, and 23 shares Class "B" Preferred b W. H. Curtice Estate, by Will T. Wrigh trustee (R. 384-5-6),

425 shares common, and 85 shares Class "A" Pre ferred, by Will T. Wright, trustee,

10 shares Class "A" Preferred and 10 shares Cla "B" Preferred, by Robert R. Rankin (R. 387,

From the minutes of the directors' meeting of Ju 22, 1931 (R. 391-2-3-4) we learn that:

> "$10,950.00 had been realized through exchan of Class "A" Preferred Stock for Class "B" Pr ferred, which amount was credited to Reserve f Losses,"

on the basis of taking in the "A" stock at 75% of par a exchanging it for "B" stock at par.

It is obvious that this transaction would call for t surrender of $43,800 for shares of "A" stock.

However, in fairness, we feel we should call the cou attention to the probability that the $10,000 in value shares of "A" stock surrendered by Portland Livest Company, Inc., as a credit on its indebtedness, may h

een included in this transaction. If this was the case, would reduce the amount of "A" stock thus acquired to 33,800.

Some light is thrown on this entire transaction by the inutes of the directors' meeting held January 12, 1932 R. 394-395) in which it is recited that under the author- y of the resolution authorizing purchase of Class "A" referred Stock at $75 per share, the holders of such ock had sold this corporation 290 shares, and that all of ich shares, together with 100 shares accepted from the ortland Livestock Company, Inc., and 40 shares here- fore purchased, had been sold at par to persons secur- g loans from the United State Department of Agricul- re.

> "He (the secretary) also reported that 202 additional shares of Class "A" Preferred Stock had been subscribed for and paid in, bringing the total Class "A" Preferred Stock outstanding as of December 31st, 1931, to 702 shares. He further reported that former holders of Class "A" Preferred Stock had subscribed and paid for from the proceeds of Class "A" Preferred Stock sold 217½ shares of Class "B" Preferred Stock, bringing the total Class "B" Preferred Stock outstanding as of December 31st, 1931, to 402½ shares."

We therefore have 290 shares acquired at $75 per sare from the former owners, and the 100 shares ac-

cepted from the Portland Livestock Company, Inc., a
40 shares theretofore purchased, ear-marked and tagg
as having been sold at par to persons securing loans fro
the United States Department of Agriculture.

In view of the fact that the stocks actually sold
Burleigh and others to the extent of $43,000 are co
pletely and absolutely identified by the minutes of t
corporation as being stock which had been sold and issu
by the corporation prior to April 1, 1931, and in view
the fact that the authority to take this stock back at 75
of par, is contained in the minutes of the directors' me
ing held April 13, 1931 (R. 389), it would seem that
should be permitted to claim, without contradiction,
follows:

That the financial statement of March 31, 1931, wh
shows outstanding "A" $50,000, and "B" $32,750, is a
solutely correct and refers only to the condition of
company at that time, without any relationship to a
sales or subscriptions for this stock which have anyth
to do with this case. In other words, authority to acq
the "A" stock was not granted until April 13, 1931.
stock which was sold is fully identified by the min
above referred to, and the lack of value of the stoc
further evidenced by the sale of $10,000 worth at $7
by an insolvent debtor, who naturally could have b
expected to have demanded par for his stock. No e

as given to this stock transaction directly or indirectly any of the financial reports, except as stated in our iginal brief.

The record ownership of $43,000 of the "A" stock as changed from the owners who had purchased it at te inception of the company to Burleigh and others nilarly situated, but the "A" stock never changed from 0,000 from a time prior to the transaction involved rein to October 31 following.

It is true the "B" stock moved up from $32,750 on arch 31 to $40,250 on April 30, but this only repre-ated a part of the increase occasioned by the switch m the original owners of the "A" stock for "B" stock.

It is true the statement of April 30, 1931, shows as asset "Due from purchasers of Class "A" Preferred ck $42,200," which item is carried into the financial tement on page 289 of the record.

In the statement of June 30, this item has been re-ced to $5000, but a corresponding credit on the stock e of the ledger account does not occur in this state-nt, or thereafter.

In other words, so far as these statements are con-ned (and they are carbon copies of statements sent to the bank) the difference between $42,200 and $5000, or $37,200 seems to have simply evaporated.

The company claimed as an asset $42,200 as due fron stock subscribers, and at that time had stock outstand ing as follows:

"A" $50,000
"B" $40,250
Common $14,900

but when this credit was cut on June 10 to $5000, we fin (R. 291) that the capital stock is:

"A" $50,000
"B" $40,250
Common $14,900

The $5000 item is carried as an asset in the statemer of August 31, with the capital stock exactly as it ha been. It is also carried as an asset on September 3 1931, with the capital stock the same, and is still carrie as an asset in October 31, 1931, with no change in tl stock set-up.

We know that the bank received from the Treasur of the United States the proceeds of Burleigh's note, set out in detail on page 250, along with the other su stantial items therein enumerated.

There can be no dispute that these financial sta ments are carbon copies furnished monthly to the ba as was testified by Miss Hinkle, Secretary-Treasurer. this was not true the plaintiff's agent, the bank, wou have denied it, or produced whatever they had.

The significance of these stock transactions may be ummarized as follows:

As an inducement to Burleigh and others to purchase ıe loan company's "A" Preferred stock, the loan comıny, through its Vice President, Mr. Wright, among ıher things, represented (R. 172) that the loan company ıs in good financial condition; that this "A" stock ould be a safe and profitable investment; that a profit ould be made between the interest rate charged by the overnment and the dividends paid on the preferred ock; and that by selling stock and increasing its capital te loan company would be enabled to increase its disounts with the bank, and thereby better serve Burleigh d other current borrowers as well as the livestock idustry generally.

Instead of selling new stock, it sold stock already tstanding and did not increase its capital structure, expt to the extent of $7500 of "B" stock up to and inıding October 30, 1931.

The company was re-examined by the bank on Octoe 31, 1931, and in its letter of December 4, 1931, the nk, speaking through its Mr. Paul F. Matson, Assista Manager, denominated indebtedness due from Curtis Farms and Schmidt, and certain real estate aggregting $37,365.38 as "worthless paper" (R. 229). These

are part of the items which were seriously criticized
the letter of Mr. W. E. Meyer, Manager, dated M
11, 1931, based on an examination made April 25, 193,
which date happens to be between the date when t
loan company determined by a resolution to sell "A
stock, already sold and outstanding, at par, after takin
it back at 75% of par.

Counsel repeatedly speaks of the loan made by t
plaintiff to the defendant. The Circuit Court of A-
peals of New York in *Payne v. Gardner, 29 N. Y.*
Tiffany) 146, 167, has defined a "loan" as follows:

> "By a loan of money is meant the delivery by o
> party, who is called the lender, to and the receipt
> the other party, who is called the borrower, of a giv
> sum of money, upon an agreement, express or impli
> to repay the sum loaned, with or without interest

Of course, this definition is by its language too li-
ited to include all classes of loans, in that the mo
which is the subject matter of the loan need not of ne s-
sity be delivered personally to the borrower, and no do
there would be other exceptions, but that it is neces
that the lender deliver the money to someone, other t
himself, would seem to be essential.

In this case the United States took Burleigh's n
and by means of the machinery set up by its agent, h

Secretary of Agriculture, through the various powers of attorney and letters of authority, was enabled to, and did, at all times, maintain complete dominion of, and control over this money, so that when the supposed delivery of the money supposed to have been loaned was finally accomplished, the money still rested in the hands of the plaintiff, through its other agent, THE BANK, where it has reposed at all times since this supposed loan.

That it was a fraud on Burleigh to represent to him that new stock was being sold, and thereby the capital increased, is beyond question.

That the stock was worth much less than par, if it had any real value, is clearly established.

That the loan company was in unsound financial condition is beyond doubt.

That Burleigh received no consideration for the loan is established beyond question.

That the plaintiff gave nothing of value for the note it is suing on would seem to be established beyond any possible question.

That the United States had had complete dominion and control over the bank, and that it was its agent in this transaction, is established by the Acts of Congress and the administrative pronouncements of the President. Only last July the President transferred complete control of

the loan company, and all similar agencies, to the Department of Agriculture. We believe the court will take judicial notice of the contents of the Federal Register, published by the *"National Archives of the United States."* We refer to *Volume 4, Number 127, Page 2[illegible], Section 401,* which reads:

> "The Farm Credit Administration, the Federal Farm Mortgage Corporation, and the Commodity Credit Corporation, and their functions and activities, together with their respective personnel, records, and property (including office equipment), are hereby transferred to the Department of Agriculture and shall be administered in such Department under the general direction and supervision of the Secretary of Agriculture, who shall be responsible for the coordination of their functions and activities."

If we do not misunderstand counsel's position, he is undertaking to argue the weight of the evidence rather than the appropriate question of whether or not the conclusions of law are sufficient to support the judgment, and whether the conclusions of law are supported by the facts as found.

> "When dealing with findings of fact made by the trial court, the question for the appellate court is whether there was any evidence to sustain the conclusion reached by the court below."
>
> *3 Amer. Jur. Sec. 900, page 464.*

In *City of St. Louis v. Rutz, 138 U. S. 226, 241, 34 L. Ed. 941, 947,* it is said:

"We cannot review the action of the Circuit Court in finding the facts which it did find and refusing to find the facts which it was asked to find and did not find. We can only inquire whether the facts found are sufficient to support the judgment."

In *Shapleigh v. Mier, 299 U. S. 468, 469, 81 L. Ed. 355, 356,* it is said:

"A jury having been waived, the trial was by a Judge, who made his findings of fact and conclusions of law and gave judgment for the defendant. From this there was an appeal, its scope, however, narrowed by the manner of the trial and the form of the decision. ** A single question was open: Were the conclusions of law supported by the facts as found, when supplemented by any other facts within the range of judicial notice."

We regret the assumption of counsel that anything in our original brief in any manner reflects upon either the present or former Chief Executive, and we do not anticipate anything we have said is subject to such construction.

Respectfully submitted,

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